

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RECEIPT # 64978
 AMOUNT \$ 250
 SUMMONS ISSUED Y-2
 LOCAL RULE 4.1 _____
 WAIVER FORM _____
 MCF ISSUED _____
 BY DPTY. CLK. P1
 DATE 6-7-05

KEVIN W. TOBIN,
Plaintiff

v.

LIBERTY LIFE ASSURANCE
COMPANY OF BOSTON and
LIBERTY MUTUAL
INSURANCE COMPANY,
Defendants

Civil Action No.

05 - 11179 DPW**COMPLAINT**

MAGISTRATE JUDGE Barker

1. Plaintiff Kevin W. Tobin (hereinafter "Tobin") is an individual and a resident of Scituate, Plymouth County, Massachusetts.
2. Defendant Liberty Life Assurance Company of Boston was and is a duly organized and existing corporation chartered under the law of the State of Massachusetts with its principal place of business at Boston, Massachusetts.
3. Defendant Liberty Mutual Insurance Company (hereinafter Liberty Mutual") was and is a duly organized and existing corporation chartered under the law of the Commonwealth of Massachusetts with its principal place of business at Boston, Massachusetts.
4. At all times material, Liberty Life Assurance Company of Boston administered the benefits plan of Liberty Mutual.
5. At all times material, Liberty Mutual was self-insured.
6. This action is brought for recovery of benefits under the Employee Retirement Income Security Act, 29 USC §§ 1001 et seq.
7. Jurisdiction is conferred upon this Court by the Employee Retirement Income Security Act, 29 USC §§1001 et seq.

8. Plaintiff was hired by the defendant Liberty Mutual on or about September 16, 1964.
9. Sometime in May 1968, the complainant was promoted to sales representative and began working out of the Braintree office of Liberty Mutual.
10. Plaintiff worked for Liberty Mutual in this capacity for over thirty years.
11. Sometime in December 1997, plaintiff took a short term disability leave.
12. In June 1998, after his disability leave, plaintiff resumed his duties as an employee of defendant.
13. In September 1998, plaintiff took a second short term disability leave.
14. In January 1999, after his disability leave, plaintiff resumed his duties as an employee of defendant.
15. Sometime in December 2000, plaintiff met with his supervisor at Liberty Mutual and advised the supervisor of his disability and the opinion of his attending physician that plaintiff should request a third disability leave.
16. Knowing that the termination of plaintiff's employment was being processed, and with the knowledge that the disability of the plaintiff was materially and negatively impacting his job performance, the supervisor of the plaintiff persuaded the plaintiff to delay processing of his disability claim.
17. Based on the encouragement of the supervisor and the representation of said supervisor that the employer wanted the plaintiff to continue with his best efforts to perform his duties despite his disability, plaintiff delayed further action in advancing his claim for disability benefits.
18. On or about January 10, 2001, the plaintiff reiterated to said supervisor that his request for a disability leave should be processed because he was unable to function on the job due to his disability.
19. At the time of this request, the supervisor of the plaintiff knew plaintiff was disabled and was about to be terminated from his position and again represented to the plaintiff that his employer wanted him to delay processing of the claim and try for a further period to do his job notwithstanding his disability.
20. On or about January 11, 2001, defendant terminated the employment of plaintiff.

21. At the time of being notified of termination, plaintiff advised the Human Resource Representative of the employer and his immediate supervisor of his disability and requested a disability leave.
22. With the knowledge that plaintiff was in fact disabled, the Human Resource Representative advised plaintiff that he was not eligible for disability benefits because his employment had just been terminated.
23. Plaintiff believed that this representation was true and in reliance thereon, did not take any further immediate action to advance the claim for disability benefits which had been requested as set forth.
24. At all times up to and including the date of termination of employment, plaintiff was a qualified participant in the plan.
25. Plaintiff later pursued his administrative remedies and was subsequently advised that his claim was denied because it was not properly advanced prior to termination of employment.
26. To the extent that plaintiff may have failed to take any action required of him to advance his claim for disability benefits, such failure resulted from his disability and/or his reliance on the misrepresentations of his supervisor and/or the Human Resource Representative of his employer.
27. Plaintiff has exhausted his administrative remedies in seeking review of the denial of benefits.

**Count I
Recovery of Benefits
Pursuant to 29 USC §1132(a)(1)(B)
ERISA**

28. Plaintiff restates and realleges the allegations of all the preceding paragraphs, and by this reference, incorporates them herein.
29. At all times material, plaintiff was entitled to short term disability benefits.
30. Prior to his termination, plaintiff made a request for short term disability benefits.
31. The request for short term disability benefits was denied.
32. Said denial was in violation of the statutory and other rights of the plaintiff.

33. Said denial was appealed by the plaintiff and all administrative remedies have been exhausted by the plaintiff. See Exhibits A, B and C attached hereto.

34. Plaintiff has been damaged by said denial.

**Count II
Failure to Provide Plan**

35. Plaintiff restates and realleges the allegations of all the preceding paragraphs, and by this reference, incorporates them herein.

36. Pursuant to 29 USC §1022, plaintiff, through his attorney requested the summary plan for the benefits of plaintiff. See Exhibit D.

37. Defendant neglected, failed and refused to provide said plan. See Exhibit E.

38. Said conduct of the defendant was in violation of the provisions of federal law.

**Count III
Breach of Contract**

39. Plaintiff restates and realleges the allegations of all the preceding paragraphs, and by this reference, incorporates them herein.

40. The defendant was contractually obligated to provide short term disability and other benefits to the plaintiff pursuant to the terms of the defendant's short term disability plan and benefits plans.

41. Defendant breached said contract by denying benefits to the plaintiff.

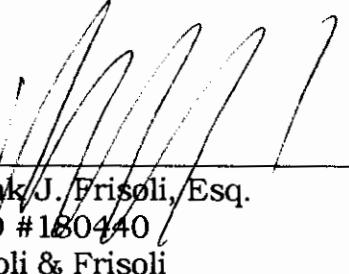
42. Plaintiff was damaged by said denial.

JURY DEMAND

Plaintiff claims a jury trial on all issues triable of right by a jury.

WHEREFORE, the plaintiff prays that this honorable Court enter judgment in favor of the plaintiff awarding to the plaintiff equitable relief, damages, multiple damages, interest, costs and attorneys fees, and grant such other relief as is meet and just.

Respectfully submitted,
KEVIN W. TOBIN
By his attorney,


Dated: June 7, 2005

Frank J. Frisoli, Esq.
BBO #180440
Frisoli & Frisoli
797 Cambridge Street
Cambridge, MA 02141
617-354-2220

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS		DEFENDANTS		
(b) County of Residence of First Listed Plaintiff <u>Plymouth, MA</u> (EXCEPT IN U.S. PLAINTIFF CASES)		County of Residence of First Listed Defendant <u>Suffolk, MA</u> (IN U.S. PLAINTIFF CASES ONLY)		
(c) Attorney's (Firm Name, Address, and Telephone Number) <u>617-354-2220</u> <u>Frank J. Frisoli, Esq. Frisoli & Frisoli</u> <u>797 Cambridge Street, Cambridge, MA 02141</u>		Attorney (If Known) <u>05-11179 DPW</u>		
II. BASIS OF JURISDICTION (Place an "X" in One Box Only)		III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)		
<input type="checkbox"/> 1 U.S. Government Plaintiff	<input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)	Citizen of This State <input type="checkbox"/> 1 <input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State <input type="checkbox"/> 4 <input type="checkbox"/> 4	
<input type="checkbox"/> 2 U.S. Government Defendant	<input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)	Citizen of Another State <input type="checkbox"/> 2 <input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State <input type="checkbox"/> 5 <input type="checkbox"/> 5	
		Citizen or Subject of a Foreign Country <input type="checkbox"/> 3 <input type="checkbox"/> 3	Foreign Nation <input type="checkbox"/> 6 <input type="checkbox"/> 6	
IV. NATURE OF SUIT (Place an "X" in One Box Only)				
CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	PROPERTY RIGHTS	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/ Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
			LABOR	<input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DOLC/DIW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))
			SOCIAL SECURITY	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act
			FEDERAL TAX SUITS	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609
V. ORIGIN (Place an "X" in One Box Only)				Appeal to District Judge from Magistrate Judgment
<input checked="" type="checkbox"/> 1 Original Proceeding	<input type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from another district (specify) _____
				<input type="checkbox"/> 6 Multidistrict Litigation
				<input type="checkbox"/> 7
VI. CAUSE OF ACTION		Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): <u>29 USC Section 1001 et seq.</u>		
		Brief description of cause: <u>Recovery of disability benefits</u>		
VII. REQUESTED IN COMPLAINT:		<input type="checkbox"/> CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23	DEMAND \$	CHECK YES only if demanded in complaint: JURY DEMAND: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
VIII. RELATED CASE(S) IF ANY		(See instructions): JUDGE <u>Woodlock</u>	DOCKET NUMBER <u>01-11979</u>	Dismissed/on appeal
DATE	SIGNATURE OF ATTORNEY OF RECORD			
June 7 2005				
FOR OFFICE USE ONLY				
RECEIPT #	AMOUNT	APPLYING IFFP	JUDGE	MAG. JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

1. Title of case (name of first party on each side only) Kevin W. Tobin vs. Liberty Mutual Life Assurance Company of Boston

2. Category in which the case belongs based upon the numbered nature of suit code listed on the civil cover sheet. (See local rule 40.1(a)(1)).

- I. 160, 410, 470, 535, R.23, REGARDLESS OF NATURE OF SUIT.
- II. 195, 196, 368, 400, 440, 441-446, 540, 550, 555, 625, 710, 720, 730, *Also complete AO 120 or AO 121
740, 790, 791, 820*, 830*, 840*, 850, 890, 892-894, 895, 950. for patent, trademark or copyright cases
- III. 110, 120, 130, 140, 151, 190, 210, 230, 240, 245, 290, 310,
316, 320, 330, 340, 345, 360, 355, 360, 362, 366, 370, 371,
380, 385, 450, 891.
- IV. 220, 422, 423, 430, 460, 480, 490, 510, 530, 610, 620, 630, 640, 650, 660,
690, 810, 861-866, 870, 871, 875, 900.
- V. 150, 152, 153.

05 - 11179-00W

3. Title and number, if any, of related cases. (See local rule 40.1(g)). If more than one prior related case has been filed in this district please indicate the title and number of the first filed case in this court.

Tobin v. Liberty Mutual 01-11979 (Dismissed/on appeal)

4. Has a prior action between the same parties and based on the same claim ever been filed in this court?

YES NO

5. Does the complaint in this case question the constitutionality of an act of congress affecting the public interest? (See 28 USC §2403)

YES NO

If so, is the U.S.A. or an officer, agent or employee of the U.S. a party?

YES NO

6. Is this case required to be heard and determined by a district court of three judges pursuant to title 28 USC §2284?

YES NO

7. Do all of the parties in this action, excluding governmental agencies of the united states and the Commonwealth of Massachusetts ("governmental agencies"), residing in Massachusetts reside in the same division? - (See Local Rule 40.1(d)).

YES NO

A. If yes, in which division do all of the non-governmental parties reside?

Eastern Division Central Division Western Division

B. If no, in which division do the majority of the plaintiffs or the only parties, excluding governmental agencies, residing in Massachusetts reside?

Eastern Division Central Division Western Division

8. If filing a Notice of Removal - are there any motions pending in the state court requiring the attention of this Court? (If yes, submit a separate sheet identifying the motions)

YES NO

(PLEASE TYPE OR PRINT)

ATTORNEY'S NAME Frank J. Frisoli, Esq.

ADDRESS 797 Cambridge Street, Cambridge, MA 02141

TELEPHONE NO. 617-354-2220